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No. 89-1909

U.S. Supreme Court, D.C.
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In The
Supreme Court of the United States
October Term, 1989

FEIST PUBLICATIONS, INC.,
Petitioner,
v.

RURAL TELEPHONE SERVICE COMPANY, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit properly affirmed the United States District Court for the District of Kansas' decision that Petitioner did not make "fair use" of Respondent's telephone directory thereby infringing Respondent's copyrighted telephone directory, and that Respondent's alleged antitrust violation is not a defense to Petitioner's copyright infringement?

LIST OF PARTIES AND RULE 29.1 LIST

There are no parties to this proceeding not revealed by the caption.

Rural Telephone Service Company, Inc., has no parent company. Rural Telephone Service Company, Inc., owns 100% of RTSC Communications, Inc. There are no other subsidiaries.

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STATEMENT

Respondent, Rural Telephone Service Company, Inc., ("Rural") is a Kansas non-profit corporation duly organized and existing under the laws of the State of Kansas to provide telephone service to its cooperative members in northwest Kansas. In conjunction with its provision of telephone service, Rural compiles, prepares, publishes, and distributes an annual telephone directory covering the telephone service area. Each and every annual telephone directory is copyrighted and registered with the proper authorities. The 1982-1983 Rural telephone directory, which is the subject of this action, was marked with an appropriate copyright notice identifying Rural as the copyright proprietor and indicating the year of publication. Rural's telephone directories are printed partly on white pages and on yellow pages. The portion printed on white pages lists in alphabetical order the names, addresses, and telephone numbers of Rural's telephone member subscribers.

Feist is a Kansas for-profit corporation. Feist publishes and distributes telephone directories in Kansas, Oklahoma, and Texas. Since 1978, Feist has published and distributed a Northwest AREA-WIDE Telephone Directory which covers some of the same geographical areas as the telephone directory published and distributed by Rural, but also covers some additional areas.

Feist began its publication of the Northwest AREA-WIDE Telephone Directory by attempting to enter into license agreements with the various telephone companies serving the area covered by the directory. Through these license agreements, the telephone companies agreed to

annually sell Feist a list of their white page listings to be used by Feist in its directory. Rural was the only telephone company in the area covered by the Northwest AREA-WIDE Telephone Directory that did not enter into a license agreement with Feist. However, other telephone companies in other directory areas also chose not to license with Feist. Feist, in 1978, unable to purchase the Rural white page listings, took the Rural telephone directory and edited it by taking out all of the listings they could not use and used the remainder of the Rural directory. Once this was accomplished, Feist sorted these listings out by town and alphabetized them. Feist then sent the various lists, broken down by towns, to verifiers it had hired in each of the towns that the directory would cover with instructions to telephone each of the listings taken from the Rural directory and attempt to verify each name, address, and telephone number. After the verifiers had carried out their instructions, they sent the lists back to Feist with penciled-in notes reflecting deletions, additions and any other changes.

In the following years, 1979 through 1982, Feist published an annual Northwest AREA-WIDE Telephone Directory. Feist used Rural's telephone directory to a limited extent during those years. Feist generally relied upon its own previous directory and made additions and deletions through the use of verifiers. In 1983, Feist decided to change the date of publication of its directory. Based upon this change, Feist decided it was advantageous to make full use of the Rural directory by simply copying Rural's telephone directory.

Rural, suspicious of Feist infringing its copyright, inserted in its 1982-1983 telephone directory a number of

fictitious listings. When Feist's 1983 Northwest AREA-WIDE Telephone Directory was published and disseminated, fictitious listings that were inserted in Rural's 1982-1983 telephone directory appeared in the Feist directory.

Rural contends that the aforementioned facts show that Feist infringed its copyright by copying its 1982-1983 copyrighted telephone directory without permission. The United States District Court for the District of Kansas and the United States Court of Appeals for the Tenth Circuit agreed with Rural's contention and issued judgments to the same.

The District Court and the Tenth Circuit both specifically ruled that courts have consistently held that telephone directories are copyrightable and that antitrust violations do not constitute a defense to a claim of copyright infringement.

SUMMARY OF ARGUMENT

Feist's petition for writ of certiorari, even though ambiguous at best, makes the argument that telephone directories should not be afforded the same protection from infringement as other compilations, and that antitrust violations should constitute a defense to a claim of copyright infringement. The District Court and the Tenth Circuit did not err in upholding the long line of case law in finding that telephone directories are copyrightable, are afforded copyright protection, can be used by others

under a "fair use" analysis; and antitrust violations do not constitute defenses to claims of copyright infringement.

ARGUMENTS

I.

TELEPHONE DIRECTORIES ARE COPYRIGHTABLE AND AFFORDED COPYRIGHT PROTECTION.

Courts have uniformly and consistently held that telephone directories are copyrightable:

Central Telephone Company of Virginia v. Johnson Publishing Co., Inc., 526 F.Supp. 838 (D.Colo. 1981); *Cincinnati and Suburban Bell Telephone Co. v. Brown*, 44 F.2d 631 (S.D. Ohio 1930); *Hutchinson Telephone Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985); *Illinois Bell Telephone Company v. Haines and Company, Inc.*, 85 C O7644, Northern District of Illinois Eastern Division, Minute Order, April 13, 1988; *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2nd Cir.), cert. denied, 259 U.S. 581, 42 S.Ct. 464, 66 L.Ed. 1074 (1922); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Hartford Printing Co. v. Hartford Directory & Publishing Co.*, 146 F. 332 (D.Conn. 1906); *Northwestern Bell Telephone Co. v. Bedco of Minnesota, Inc.*, 501 F.Supp. 299 (1980); *Northwestern Telephone Systems, Inc. v. Local Publications, Inc.*, 208 U.S.P.Q. 257 (D.Mont. 1979); *Southern Bell Telephone & Telegraph Co. v. Donnelly*, 35 F.Supp. 425 (S.D.Fla. 1940); *Southern Bell Telephone and Telegraph Company v. Associated Telephone Directory Publishers*, 756 F.2d 801 (11th Cir. 1985); *Southwestern Bell Telephone Co. v. Nationwide Independent Directory Service, Inc.*, 371 F.Supp. 900 (W.D.Ark. 1974);

United Telephone Co. of Missouri v. Johnson Publishing Co., 671 F.Supp. 1514 (W.D.Mo. 1987); *United Telephone Co. v. Johnson Publishing Co.*, 855 F.2d 604 (8th Cir. 1988).

II.

THE LAW ALLOWS "FAIR USE" OF A TELEPHONE DIRECTORY

Courts have uniformly and consistently held that under a "fair use" analysis a compiler of a directory may make "fair use" of an existing compilation if he first makes an independent canvass, then merely compares and checks his own compilation with that of the copyrighted publication and publishes the result after verifying the additional items derived from the copyrighted publication. Since the copyright covers the compilation of the information and not the individual names and addresses, if there is substantial copying from the plaintiff's work without an independent canvass initially, the resulting work will be an infringement even when the defendant later verifies the material by checking the plaintiff's original sources:

Central Telephone Company of Virginia v. Johnson Publishing Co., Inc., 526 F.Supp. 838 (D.Colo. 1981); *Harper & Row Publishers, Inc. v. National Enterprises*, 471 U.S. 539 (1985); *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2nd Cir.), cert. denied, 259 U.S. 581, 42 S.Ct. 464, 66 L.Ed. 1074 (1922); *Northwestern Telephone Systems, Inc. v. Local Publications, Inc.*, 208 U.S.P.Q. 257 (D.Mont. 1979).

The District Court and the Tenth Circuit were correct in finding that Feist, by simply copying Rural's telephone directory, failed to make "fair use" of Rurals' telephone directory.

III.

FEIST IS INCORRECT WHEN IT STATES THAT WHITE-PAGE LISTINGS ARE AN ESSENTIAL FACILITY TO A PUBLISHER

Courts have *uniformly and consistently* held that a telephone company's white pages listings are not considered as an essential facility under antitrust laws:

Directory Sales Management Corp. v. Ohio Bell Telephone Co., 833 F.2d 606 (6th Cir. 1987); *White Directory of Rochester, Inc. v. Rochester Telephone Corp.*, 714 F.Supp. 65 (W.D.N.Y. 1989); *Rural Telephone Service Company, Inc. v. Feist Publications, Inc.*, ___ F.Supp. ___, 1990 W.L. 38980 (D.Kan.), 58 U.S.L.W. 2633 (D.Kan. 1990)

IV.

ANTITRUST VIOLATIONS ARE NOT AND HAVE NEVER BEEN A DEFENSE TO A CLAIM OF COPYRIGHT INFRINGEMENT

Courts have also *uniformly and consistently* held that antitrust violations do not constitute defenses to a claim of copyright infringement:

Orth-O-Vision, Inc. v. Home Box Office, 474 F.Supp. 672, 686 (S.D. N.Y. 1979); *Peter Pan Fabric, Inc. v. Candy Frocks, Inc.*, 187 F.Supp. 334, 336 (S.D. N.Y. 1960); *Harms, Inc. v. Sansom House Enterprises, Inc.*, 162 F.Supp. 129, 135 (E.D.Pa. 1958); *Leo Feist, Inc. v. Lew Tandler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959); *Buck v. Newsreel, Inc.*,

25 F.Supp. 787, 789 (D.Mass. 1938); *Buck v. Cecere*, 45 F.Supp. 441, 441-2 (W.D. N.Y. 1942); *Contra M. Witmark & Sons v. Jensen*, 80 F.Supp. 843, 850 (D.Minn. 1948).

CONCLUSION

Respondent would respectfully submit that Petitioner has failed again to consider the seventy-five years of unfettered case law in the area of copyright law relating to telephone directories and their use by others; and that antitrust violations do not constitute a defense to a claim of their infringement. Petitioner cannot cite one case in the area of copyright or antitrust law contradicting the voluminous number of cases in support of Respondent's copyright claim and the District Court and Tenth Circuits opinions in favor of Respondent. Petitioner's case presents absolutely no significant or important reason for granting a writ of certiorari.

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